

ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Burton Analyst: Marion Mann DeJong Bill Number: SCA 1
Related Bills: See Legislative History Telephone: 845-6979 Introduced Date: 12/02/2002
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: Access to Government Information

SUMMARY

This is a proposal would do the following:

- place a constitutional amendment on the ballot that would make access to information concerning the conduct of the people's business a constitutional right of every person in California,
- require state agencies to prove that a specified item of information is not public information, rather than making a person prove that it is public information, and
- repeat existing provisions of the Public Records Act in the state constitution.

PURPOSE OF THE PROPOSED CONSTITUTIONAL AMENDMENT

According to the information provided by the author's staff, the purpose of this measure is to give Californians a clear constitutional right to:

- define how open their government should be,
- know what their government is doing,
- express their views by being able to attend meetings of key government bodies and be heard in those meetings, and
- find out information held in government records.

EFFECTIVE/OPERATIVE DATE

The next primary election in which this proposed constitutional amendment could be included would be March 2, 2004, and the amendment, if approved, would be effective the day after the election upon approval of a majority of those who vote on the ballot measure.

POSITION

Pending.

However, it should be noted that on March 6, 2002, the Franchise Tax Board had a split vote on a similar proposal, SCA 7 as introduced January 10, 2002, which resulted in no position being taken on that constitutional amendment.

Board Position:

_____ S	_____ NA	_____ NP
_____ SA	_____ O	_____ NAR
_____ N	_____ OUA	_____ <u>X</u> PENDING

Department Director

Date

Gerald H. Goldberg

12/23/02

ANALYSIS

FEDERAL/STATE LAW

Under state law, the Bagley-Keene Open Meeting Act requires that all meetings of a state body be open and public. A state body conducting a meeting is required to:

- provide an agenda and specified notice of its public meetings at least 10 days in advance of the meeting,
- declare the reason for a closed session prior to the closed session and cite the specific statutory authority for the closed session, and
- report, at a subsequent public meeting, any action or roll call vote to appoint, employ, or dismiss a public employee made during a closed session.

Under federal law, the Freedom of Information Act (FOIA) requires federal agencies to make public information available upon request, unless specifically exempted by law. The provisions under FOIA are similar to the California Public Records Act.

The California Public Records Act requires that all state and local agencies make their public records available for public inspection during office hours, unless exempted by law. When a member of the public either makes a request to inspect or obtain a copy of a public record, to the extent possible, the agency must:

- assist the requester to identify records and information that may be responsive to the request or the purpose of the request,
- describe where the records are located (e.g., information technology or actual physical location), and
- assist the requester with reasonable options to obtain records responsive to their inquiry.

The California Public Records Act also requires that if a state agency withholds any public record, it must demonstrate that the record was exempt from disclosure, or the public interest for nondisclosure outweighed the public interest for disclosure.

Existing federal and state laws prohibit the disclosure of any taxpayer information, except as specifically authorized by statute. Any Franchise Tax Board employee or member responsible for the unauthorized disclosure of federal or state tax information is subject to criminal prosecution. Improper disclosure of federal tax information is punishable as a felony and improper disclosure of state tax information is punishable as a misdemeanor.

THIS CONSTITUTIONAL AMENDMENT

This proposal would place a constitutional amendment on the ballot that would make access to information concerning the conduct of the people's business a constitutional right of every person in California. This constitutional amendment, if adopted, would no longer require a member of the public to show that records are public. Instead, the official in charge of records would be required to show that the information sought is not a public record. In addition, it would repeat existing provisions of the Public Records Act in the state constitution. Specifically, this measure would:

- Provide that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in California.
- Specify that public agencies and officers exist to aid in the conduct of the people's business. Therefore, their actions and deliberations should be open to public scrutiny.
- Make it a constitutional right for a person to attend, observe, and be heard in the meetings of elected and appointed public bodies. The measure would also make it a constitutional right to inspect and

obtain copies of records made or received in connection with the official business of any public body, agency, officer, or employee, or anyone acting on their behalf. This would include information regarding the official performance or professional qualifications of elected or appointed officials who have or appear to have substantial responsibility for or control over the conduct of governmental affairs. This would also include information regarding the professional qualifications of candidates or applicants for elective or appointive positions.

- Provide that this constitutional amendment may not be construed to supersede the right to privacy guaranteed by the California Constitution. In addition, it would not limit the ability of the Legislature to enact laws or the Judicial Council to provide rules consistent with statutes for the protection of personal privacy.
- Authorize the Legislature by enacting laws or the Judicial Council by adopting rules (consistent with statute) to limit the right of access to information concerning the conduct of the people's business, but only if necessary to protect public safety or private property, to ensure the fair and effective administration of law, or to preserve public funds and resources.
- Require that in demonstrating the justification for nondisclosure, the public body, agency, officer, or employee must deny access based on either attorney-client privilege or particularized findings that a specific harm to the public interest cannot be averted by reasonable alternatives. The denial of access could be no broader in scope or longer in duration than necessary to avert the identified harm.
- Limits availability of information relating to peace officers by requiring requests for information to conform to procedures governing discovery or disclosure enacted by the legislature.
- Provide that the constitutional amendment would not apply to judicial proceedings, other than public interest proceedings or judicial records.
- Stipulate that all statutes and rules of court limiting access to information concerning the conduct of the people's business that are in effect on the operative date of this constitutional amendment shall remain in effect until amended or repealed by the Legislature or determined to be unconstitutional by a court.

IMPLEMENTATION CONSIDERATIONS

- Although the proposed constitutional amendment specifies that it would not immediately invalidate any existing laws that limit public access, it is unclear the extent to which adoption of this measure would result in existing laws eventually being found unconstitutional.
- The proposed measure provides constitutional authority for access to government records, limited only by the constitutional right to privacy and statutes that limit access based on specified criteria. Generally the constitutional right to privacy is limited to individuals. If existing statutes making business tax returns confidential are invalidated, the department may be required to disclose business tax returns and audit files. Public access to such information may prompt businesses to diminish the amount and quality of information provided for tax administration purposes. Any reduction in the quality or quantity of information provided by taxpayers may adversely affect tax administration.
- It is unclear how a person would exercise the rights provided by this measure during a hearing of a tax appeal before the Board of Equalization or a hearing of an allocation and apportionment petition before the Franchise Tax Board. Specifically, it is unclear if the provision would allow any member of the public to participate during such hearings.
- It appears that portions of the personnel file of the Executive Officer as well as other employees who could be considered holders of appointive office would be available to public inspection, to the extent

such records “regard their official performance” or “regard their qualifications.” Virtually every public employee is appointed. Unless the concept of “appointive office” is clarified, this constitutional amendment could be interpreted to allow the public access to the personnel record of *any* state employee.

- The proposed constitutional amendment provides that all existing statutes and rules of court limiting public access to governmental meetings and records shall remain in effect until amended, repealed, or “judicially determined” to be inconsistent with the proposed amendment. This provision could be interpreted to invalidate an existing statute regarding access to government records if a superior court makes a determination that the statute conflicts with the proposed constitutional amendment. Existing provisions of the California Constitution (i.e., Art. III, Sec. 3.5) require a state administrative agency to apply an existing statute until an appellate court has made a final determination that the statute is unconstitutional. The author may wish to make this provision consistent with other existing provisions of the constitution.
- The proposed constitutional amendment requires the public agency to make a particularized finding that a specified harm to the public interest cannot be averted by reasonable alternative, unless the information sought is a “confidential communication between an attorney and his or her client conveyed to provide or obtain legal advice or representation.” Evidence Code section 952 defines the attorney-client privilege and a significant body of case law has been developed to interpret this privilege. Currently, communications in addition to those directly between the client and attorney are covered by the attorney-client privilege (e.g., the work of expert witnesses at the attorney’s direction). The author might consider amending the bill to specify that the information must be protected by the attorney-client privilege as defined by section 952 of the Evidence Code.

LEGISLATIVE HISTORY

SCA 7 (Burton, 2001/2002) was identical to this proposed constitutional amendment. SCA 7 passed the Senate but was held at the Assembly Desk.

SB 48 (Sher, 1999/2000) and SB 2027 (Sher, 1999/2000) would have amended the California Public Records Act to require that state agencies justify the withholding of any record by demonstrating in writing that a record is exempt from disclosure or the public interest is served by not making the record public. These bills would have established a procedure to allow any person to appeal to the Attorney General if a state or local agency denies access to a public record or subverts the intent of the bill by actions short of denial of inspection. Governor Davis vetoed SB 48 because of its interaction with another bill he signed and its potentially significant costs. Governor Davis vetoed SB 2027 because of the “bureaucratic reporting mechanism” the bill was establishing and its potentially significant costs. The sponsor cites these vetoes as one of the reasons that a constitutional amendment is necessary.

AB 2799 (Shelley, Stats. 2000, Ch. 982) required denials of requests for public records to be in writing.

AB 192 (Canciamilla, Stats. 2001, Ch. 243) made modifications to the Bagley-Keene Open Meeting Act, including requiring a posted agenda for teleconference meetings and requiring a notice posted on the Internet when a state body intends to take actions on items not included on a posted agenda.

AB 1014 (Papan, Stats. 2001, Ch. 355) requires agencies when responding to a request for public records to estimate the date and time the records will be available and to provide additional services (e.g., help the requestor identify records).

OTHER STATES' INFORMATION

According to information provided by the author's staff, several other states, including Florida, Tennessee, Montana, and New Hampshire, have constitutional provisions guaranteeing public access to the government.

FISCAL IMPACT

This measure would not significantly impact the department's costs.

ECONOMIC IMPACT

This measure would not impact the state's income tax revenue or the Franchise Tax Board's administration of state income tax.

ARGUMENTS/POLICY CONCERNS

Current statutes provide the rights proposed by this constitutional amendment. The amendment in effect shifts the burden of proving whether an item of information is public information from a person to public body or official. The sponsors of this measure argue that existing laws have not stopped widespread secrecy in government. They state that this constitutional amendment is necessary because a public body or official can cite a statutory exemption from access to public information without providing a justification that shows what is being protected.

LEGISLATIVE STAFF CONTACT

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